**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **KATHY RICHARDSON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 258,445 |
| **U.S.D. NO. 259** | ) | |
| Respondent, | ) | |
| Self-Insured | ) | |

## ORDER

Respondent appealed the June 18, 2001 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on December 14, 2001, in Wichita, Kansas.

### APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Gary K. Albin of Wichita, Kansas, appeared for respondent.

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

### ISSUES

This is a claim for an October 20, 1999 accident and resulting injuries to the low back. In the June 18, 2001 Award, Judge Frobish awarded claimant a 69.5 percent work disability (a disability greater than the functional impairment rating) after finding that claimant had sustained a 90 percent task loss and a 49 percent wage loss.

In determining wage loss, the Judge found that claimant did not prove that she made a good faith effort to find appropriate employment. Accordingly, the Judge imputed a post-injury wage of $240 per week for the wage loss prong of the permanent partial general disability formula.

In determining task loss, the Judge held that the restrictions provided by claimant's treating physician and the restrictions provided by Dr. Pedro A. Murati were appropriate and, therefore, found that claimant had a 90 percent task loss. The Judge reasoned, in part:

> There is a wide divergence of opinions as to the Claimant's task loss. Dr. Fevurly did not feel that the Claimant is in need of any restrictions and is capable of performing any task. Dr. Murati feels the Claimant is in need of restrictions and believes the Claimant has a 90% task loss.
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> Dr. Fevered [sic] rated the Claimant as having a 5% impairment but did not feel that warranted restrictions. This is in opposition to both the treating physician and Dr. Murati. The reason this matter is before the Court is because the treating physician, provided by the Respondent, imposed restrictions which the Respondent could not accommodate. The Court finds that the restrictions of the treating physician and Dr. Murati are appropriate.
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> As the only physician to testify which [sic] has imposed restrictions upon which a task loss may be determined is Dr. Murati, the Court will adopt his opinion. The Claimant has a 90% task loss.

Respondent contends Judge Frobish erred. It argues that claimant has no work disability greater than the percentage of functional impairment as claimant has allegedly neither sustained any task loss nor made a good faith effort to find appropriate employment. Respondent also argues that any award to claimant should be reduced by the 60 percent work disability she received in an earlier claim for injuries to her upper extremities and/or by any preexisting functional impairment.

On the other hand, claimant argues the Award should be increased as the permanent partial general disability should be computed using a 100 percent wage loss.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?

2. Should claimant's award for this back injury claim be reduced either by an earlier work disability awarded claimant for injuries to claimant's upper extremities or by the functional impairment that claimant sustained for the earlier bilateral upper extremity injuries?

## FINDINGS OF FACT

After reviewing the entire record, the Board finds as follows:

1. In approximately August 1998, claimant began working for respondent, a school district, as a cook. She first worked at one of the schools and later transferred to the central food production facility, where respondent prepares meals for 23,000 students and teachers.

2. On October 20, 1999, claimant injured her back while attempting to prevent a cart from tipping over. The parties agreed that on that date claimant sustained personal injury by accident arising out of and in the course of employment.

3. Claimant sought medical treatment for her back and was referred to Dr. John Estivo. The doctor prescribed injections and physical therapy. On approximately April 17, 2000, claimant attempted to return to her job as a cook with a 35-pound lifting restriction but she was only able to work several days as she was unable to perform the required repetitious bending, stooping and twisting. There is no dispute that claimant's cooking job in the school district's central food production facility was physically demanding. Claimant's supervisor, Linda Travis, testified, in part:

> Q. (Mr. Albin) What would those [the job's lifting requirements] be?
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> A. (Ms. Travis) We basically ask on the form or on our interview team if they can take and lift up to 50 pounds. Basically, our requirements are if it is anything over 30 pounds we ask if they will take and get help from another -- a coworker.
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> Q. Are there any other requirements with regard to bending or stooping or twisting?
>
> A. We just tell them [job applicants] that, you know, it is very physical. It is not like serving a school. We try to, you know, be as honest with an employee coming in that it is a physical job. It is very -- day in and day out you are doing the same thing. Maybe different items, but it still involves the same motions.[1]

4. Dr. Estivo ultimately released claimant from medical treatment on April 24, 2000, with a 35-pound lifting restriction and restrictions against bending, stooping and twisting more than one-third of the work shift. Without accommodations, claimant's cooking job was beyond the medical restrictions placed upon her by Dr. Estivo.

5. After the April 24, 2000 release, claimant contacted respondent about returning to work. According to an April 26, 2000 letter from respondent to a Security Benefit Life Insurance claims analyst, claimant's supervisor determined that claimant was unable to

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[1] Deposition of Linda Travis, March 28, 2001; p. 7.

perform her job as a cook as she was required to constantly lift up to 35 pounds and constantly bend, twist and stoop.

6. Respondent could not accommodate claimant's restrictions and referred her to vocational rehabilitation counselor Doug Lindahl. Mr. Lindahl evaluated claimant's ability to earn wages and also prepared a list of work tasks that claimant had performed in the 15-year period immediately preceding the October 1999 back injury. At the regular hearing, claimant reviewed Mr. Lindahl's task list and acknowledged its accuracy.

7. Claimant has not worked since receiving her final release from Dr. Estivo in April 2000. Instead, claimant now receives $700 per month in Social Security disability benefits and $100 per month from the Kansas Public Employees Retirement System (KPERS). When claimant testified at the February 2001 regular hearing, she had applied for 18 jobs since her April 2000 release to return to work. In a June 29, 2000 report to respondent, Mr. Lindahl noted that claimant was not pursuing employment.

8. One of claimant's former employers was Wichita Arms, a firearms manufacturer and retailer, where claimant worked as a bookkeeper. Claimant worked for that employer for almost 10 years, doing all the accounting and payroll work for the different departments – wholesale, retail and manufacturing. According to claimant, the job required intensive use of computers and keyboards. While performing that job, claimant developed bilateral upper extremity injuries for which she filed a workers compensation claim and was later awarded permanent partial disability benefits.

9. The parties neither introduced into evidence nor asked the Judge to take administrative notice of the Award claimant received for the injuries she sustained at Wichita Arms. But in an April 2, 2001 letter from Dr. Chris D. Fevurly to respondent's attorney, which was introduced at Dr. Fevurly's deposition, the doctor states that claimant worked at Wichita Arms from 1984 to 1994 and sustained an overuse syndrome and upper extremity pain that caused her to leave that employment. Additionally, there are statements at the regular hearing and statements in the deposition of Brad O. Broadfoot that this Board found in claimant's workers compensation proceeding against Wichita Arms that claimant had sustained a 60 percent loss of ability to perform work in the open labor market due to her upper extremity injuries. Respondent's attorney asked the following questions at the regular hearing:

> Q. (Mr. Martin) And as I understand it it looks like -- I guess your case went to the Kansas Work Comp Appeals Board. Does that sound right?
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> A. (Claimant) I think.
>
> Q. And I'm showing that they showed you had a loss of ability to perform work in the open labor market of 60 percent. My question -- and this would

have been back in the mid-'90s before you worked for the School District. Is that right?

A. Yes.[2]

10. After leaving Wichita Arms, claimant experienced some personal health problems and did not work for a period of time. Claimant then re-entered the work force and drove a bus for a short period but she had problems from gripping the steering wheel and the wheel vibrating. Claimant also worked for a short period as a self-employed day-care provider for small children but she experienced problems with her hands doing that type of work.

11. When respondent hired claimant as a cook, she did not volunteer she had previously injured her upper extremities working for Wichita Arms as she did not believe the job duties were similar. According to claimant, her upper extremity injuries prevent her from performing fine movements with her hands such as those required by computer keyboards, calculators and writing. When she was hired by respondent, claimant believed she had the ability to perform the duties of a cook.

12. Despite the earlier upper extremity problems, claimant successfully worked for respondent performing her cooking duties for more than a year before injuring her back in the October 20, 1999 accident.

13. Claimant's attorney hired Dr. Pedro A. Murati, a physician board-certified in rehabilitation and physical medicine and also board-certified as an independent medical examiner, to evaluate claimant's low back pain for purposes of this claim. Dr. Murati examined claimant in October 2000 and diagnosed low back pain secondary to lumbar radiculopathy. Part of the doctor's evaluation included reviewing the results from an MRI that had been ordered by Dr. Estivo. The MRI indicated claimant had degenerative disk disease at L4-5 and L5-S1 with a central protrusion at L5-S1 and a bulge at L4-5. The doctor also reviewed the results from a CT myelogram that indicated a large disk bulge at L4-5. The doctor's physical examination revealed, among other things, decreased sensation along both the right L5 dermatome and the left S1 dermatome and a missing right hamstring reflex.

Using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), Dr. Murati determined claimant had a 10 percent whole body functional impairment for the injuries sustained in the October 1999 accident. The doctor recommended that claimant observe the following work restrictions and limitations due to the back injury:

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[2] Transcript of February 21, 2001 regular hearing, pp. 38, 39.

> No bending. Occasional sitting, stairs, ladders, squatting, drive. Frequent stand and walk. Occasional lift 20 pounds, frequent 10, constant 5. No greater than 20 pounds lifting. Alternate sit, stand, and walk. And constant lift 5 pounds, and use good mechanics at all times.[3]

Applying those work restrictions to Mr. Lindahl's list of former work tasks, Dr. Murati found that claimant had lost, as a result of the back injury, the ability to perform 19 of the 21 tasks, or approximately 90 percent, which claimant performed in the 15-year period immediately preceding the October 1999 accident.

14. Respondent's attorney hired Dr. Chris Fevurly to evaluate claimant for purposes of this claim. Dr. Fevurly is board-certified in both internal medicine and occupational medicine and also board-certified as an independent medical examiner. The doctor spends three days per week treating patients in Lawrence, Kansas, and two days per week consulting and performing medical evaluations from offices in Kansas City, Lawrence, and Wichita.

Dr. Fevurly examined claimant in March 2001 and diagnosed regional low back pain without nerve root impingement. The doctor also believes claimant has depression, probable anxiety disorder, and a somatoform disorder, all of which contribute to claimant perceiving herself as being severely disabled.

Dr. Fevurly determined claimant sustained a five percent whole body functional impairment according the AMA *Guides* due to the October 1999 accident and resulting back injury. But the doctor determined claimant required no medical restrictions due to the back injury and, therefore, had not lost any of her ability to perform her former work tasks. Nonetheless, the doctor testified that claimant had a marked loss of function due to her psychological condition:

> Q. (Mr. Seiwert) So she has impairment, but no restrictions?
>
> A. (Dr. Fevurly) There are no objective factors to recommend any permanent limitations or restrictions.
>
> Q. But there are objective factors to make a permanent impairment?
>
> A. Correct.
>
> Q. From a psychological standpoint, however, she would have a pretty marked loss of function, correct?

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[3] Deposition of Dr. Pedro A. Murati, March 29, 2001; p. 8.

> A. Right. Disability is affected by psychosocial, behavioral, environmental factors. And as I stated in here, I believe that those are the major reasons why she still has her pain and why she is unable to cope with duties.[4]

15. In addition to creating a task list, Mr. Lindahl also analyzed claimant's post-injury ability to earn wages. According to Mr. Lindahl, claimant retains the ability to earn between $6 and $6.80 per hour being a ticket taker, hostess, or retail sales clerk. In reaching that conclusion, Mr. Lindahl assumed that claimant should not lift greater than 25 pounds, should not stoop or twist over one-third of the shift, and should not use her hands in a repetitive manner. Therefore, according to Mr. Lindahl and assuming claimant worked 40 hours per week, claimant retains the ability to earn between $240 and $272 per week, which is between 42 and 49 percent less than her pre-injury average weekly wage of $470.66.

16. Besides Mr. Lindahl, respondent also hired Brad O. Broadfoot, a human resources consultant from Hutchinson, Kansas, to evaluate claimant for purposes of this claim. According to Mr. Broadfoot, claimant retains the ability to perform work such as a florist delivery person, parking lot attendant, receptionist, hotel desk clerk, ticket taker, and restaurant hostess, as long as the particular job did not require a tremendous amount of computer input. Based on his analysis, Mr. Broadfoot believes claimant retains the ability to earn an average wage of $272 per week, which is 42 percent less than what she was earning at the time of the work-related back injury.

## CONCLUSIONS OF LAW

1. The Award should be modified to correct the amount of temporary total disability benefits due claimant as a result of this work-related accident. While claimant was being paid temporary total disability benefits, respondent was continuing to pay for claimant's additional compensation items. Accordingly, claimant's average weekly wage for computing the temporary total disability compensation should be $397.89. The Board affirms the Judge's finding that claimant has sustained a 69.5 percent work disability.

2. Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference

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[4] Deposition of Dr. Chris Fevurly, May 4, 2001; pp. 39, 40.

> between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

3. Judge Frobish found claimant had failed to prove that she made a good faith effort to find appropriate employment and, therefore, imputed a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula. Finding claimant retained the ability to earn $240 per week, the Judge determined claimant had sustained a 49 percent wage loss.

The Board affirms those conclusions. First, despite retaining the ability to work, claimant is neither working nor looking for work. Second, according to the testimony of Mr. Lindahl, which the Board finds credible and persuasive, claimant retains the ability to earn $240 per week, which creates a 49 percent loss in wages when compared to the stipulated $470.66 pre-injury average weekly wage.

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Copeland*, p. 320.

4. The Judge determined that claimant had sustained a 90 percent task loss based upon Dr. Murati's testimony. The Board affirms that finding and conclusion. Both claimant's treating physician, Dr. Estivo, and claimant's medical expert, Dr. Murati, determined that claimant should observe work restrictions and limitations as a result of her back injury. On the other hand, respondent's medical expert, Dr. Fevurly, determined claimant should not be restricted in any manner. But Dr. Fevurly did acknowledge that claimant had a permanent functional impairment and, in addition, a marked loss of function due to her psychological response to her physical injury and pain. Under the facts presented, Dr. Murati's task loss opinion is persuasive.

5. As required by the formula, the 49 percent wage loss is averaged with the 90 percent task loss, producing a 69.5 percent permanent partial general disability.

6. Respondent's request for an offset to claimant's award of permanent partial general disability benefits is denied. The Workers Compensation Act provides for reducing awards under K.S.A. 1999 Supp. 44-501(c) and K.S.A. 44-510a (Furse 1993).

Under K.S.A. 1999 Supp. 44-501(c), awards are reduced by the amount of preexisting functional impairment when a preexisting condition is aggravated. That statute provides:

> The employee **shall not be entitled to recover for the aggravation of a preexisting condition**, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be **reduced by the amount of functional impairment** determined to be preexisting. (Emphasis added.)

Because the October 1999 accident injured claimant's back and did not aggravate a preexisting condition, K.S.A. 1999 Supp. 44-501(c) is not applicable.

Under K.S.A. 44-510a (Furse 1993), awards are offset when there are overlapping weeks of permanent partial general disability benefits payable from two compensable accidents and the earlier disability contributes to the overall disability created by the later injury. That statute provides:

> If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or **partial disability for such later injury shall be reduced**, as provided in subsection (b) of this section, **by the percentage of contribution that the prior disability contributes to the overall disability following the later**

> **injury**. . . . Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment. (Emphasis added.)

Respondent has failed to prove an earlier disability has contributed to claimant's overall disability following the October 1999 accident. Moreover, respondent has failed to prove there are any weeks of permanent partial general disability benefits from an earlier work-related accident that overlap with the weeks of permanent partial general disability due claimant because of the October 1999 back injury. Accordingly, this award cannot be reduced under K.S.A. 44-510a (Furse 1993).

7. At oral argument before the Board, respondent requested the Board to remand the claim to the Judge for taking additional evidence concerning the earlier Award entered on behalf of claimant against Wichita Arms. Claimant objected to the Board taking administrative notice of that Award as the request was not made to the Judge and that evidence was not before the Judge for consideration. At oral argument, claimant also objected to the Board remanding the case to the Judge for taking additional evidence.

The Board agrees with claimant's arguments. The Award against Wichita Arms was not introduced into the evidentiary record. Moreover, the parties did not ask the Judge to take administrative notice of the Award. Accordingly, that Award is not part of the evidentiary record to be considered on this appeal. The Act provides:

> The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.[8]

The Board also concludes that respondent's request for remand should be denied. Respondent had adequate opportunity to present its evidence within the terminal dates set by the Judge.[9] Under the facts presented, the Board is unable to justify an order for remand. Accordingly, respondent's request for a remand to the Judge is denied.

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[8] K.S.A. 44-555c(a).

[9] See K.S.A. 44-523.

8. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

## AWARD

**WHEREFORE**, the Board modifies the June 18, 2001 Award entered by Judge Frobish to correct the amount of temporary total disability compensation due claimant.

Kathy Richardson is granted compensation from U.S.D. No. 259 for an October 20, 1999 accident and resulting disability. Ms. Richardson is entitled to receive 25 weeks of temporary total disability benefits at $265.27 per week, or $6,631.75, plus 281.48 weeks of permanent partial disability benefits at $313.79 per week, or $88,325.61, for a 69.5 percent permanent partial general disability. The total award is $94,957.36

As of December 31, 2001, there is due and owing to the claimant 25 weeks of temporary total disability compensation at $265.27 per week in the sum of $6,631.75, plus 89.71 weeks of permanent partial general disability compensation at $313.79 per week in the sum of $28,150.10, for a total of $34,781.85, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $60,175.51 shall be paid at $313.79 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award.

**IT IS SO ORDERED.**

Dated this ____ day of December 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director